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SENATE BILL 651

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Michael S. Sanchez

AN ACT

RELATING TO REAL PROPERTY; ENACTING THE MORTGAGE FAIR
FORECLOSURE ACT; PROVIDING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Mortgage Fair Foreclosure Act".

Section 2. LEGISLATIVE FINDINGS.--The legislature finds
it to be the public policy of New Mexico that homeowners should
be given reasonable notice of the fact of and basis for an
alleged default on their mortgage and the opportunity to pay
their home mortgages if they are deficient, and that lenders
will be benefited when residential mortgage debtors cure their
defaults and return defaulted residential mortgage loans to
performing status.

Section 3. DEFINITIONS.--As used in the Mortgage Fair

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1 Foreclosure Act:

2 A. "debtor" means a natural person shown on the
3 record of a mortgage lender as being obligated to pay the
4 obligation secured by that mortgage;

5 B. "lender" means a person that makes or holds a
6 residential mortgage and a person to which a mortgage is
7 assigned;

8 C. "mortgage" means a mortgage, security interest,
9 deed of trust or the like in which the security is a
10 residential property in New Mexico such as a house, real
11 property or condominium that is occupied, or is to be occupied,
12 by the debtor, who is a natural person, or a member of the
13 debtor's immediate family, as that person's residence; and

14 D. "servicer" means a person that, whether for
15 compensation or gain from another or on its own behalf, engages
16 in the business of receiving any scheduled periodic payments
17 from a debtor pursuant to the terms of any mortgage loan,
18 including amounts for escrow accounts, and making the payments
19 of principal and interest and such other payments with respect
20 to the amounts received from the debtor as may be required
21 pursuant to the mortgage loan, the mortgage servicing loan
22 documents or the servicing contract with a lender.

23 Section 4. APPLICABILITY.--The Mortgage Fair Foreclosure
24 Act applies to all mortgages wherever made that have as their
25 security such a residence in New Mexico, provided that the real

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1 property that is the subject of the mortgage shall not have
2 more than four dwelling units, one of which shall be, or is
3 planned to be, occupied by the debtor or a member of the
4 debtor's immediate family as the debtor's or family member's
5 residence at the time the mortgage is executed.

6 Section 5. WRITTEN NOTICE OF INTENT TO ACCELERATE LOAN OR
7 FORECLOSE.--

8 A. Upon a failure to perform any obligation of a
9 mortgage by a debtor and before any lender or servicer may
10 accelerate the maturity of a mortgage obligation and commence a
11 foreclosure or other legal action to take possession of the
12 property that is the subject of the mortgage, the lender or
13 servicer shall give the debtor notice of such intention at
14 least thirty days in advance of such action.

15 B. Notice of intent to accelerate the maturity of a
16 mortgage obligation, commence a foreclosure or take any other
17 legal action to take possession of the property that is the
18 subject of the mortgage shall be in writing, and either served
19 personally on the debtor or sent to the debtor by registered or
20 certified United States mail, postage prepaid and return
21 receipt requested, at the debtor's last known address, and if
22 different, to the address of the property that is the subject
23 of the mortgage. If notice is accomplished by mail, notice
24 shall also be sent to any alternative address that the debtor
25 has provided to the lender or servicer. The notice is deemed

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1 to have been effectuated on the date the notice is served
2 personally on the debtor or three days following the deposit of
3 the notice in the United States mail.

4 C. The written notice required pursuant to
5 Subsection A of this section shall clearly and conspicuously
6 state in a manner reasonably calculated to apprise the debtor
7 of the following:

8 (1) the property that is the subject of the
9 security instrument being foreclosed upon, the particular
10 obligation or real estate security interest being foreclosed
11 upon and the parties to any such obligation or interest;

12 (2) the nature of the default claimed;

13 (3) the right of the debtor to cure the
14 default as provided in Section 7 of the Mortgage Fair
15 Foreclosure Act;

16 (4) what performance, including the sum of
17 money, if any, required to cure the default as of the date
18 specified pursuant to Paragraph (6) of this subsection;

19 (5) the allocation of money due and owing to
20 principal, interest, fees and any other applicable allocation,
21 including a projection of the change in money due as a result
22 of daily accrual during the thirty-day period set forth in
23 Paragraph (6) of this subsection;

24 (6) the date by which the debtor shall cure
25 the default to avoid initiation of foreclosure proceedings or

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1 the initiation of any other legal action to take possession of
2 the residential property that is the subject of the mortgage,
3 which date shall not be less than thirty days after the notice
4 is effectuated, and the name, address and telephone number of a
5 person to whom the payment or tender shall be made;

6 (7) the lender's right to take steps to
7 terminate the debtor's ownership in the property by commencing
8 a foreclosure suit in a court of competent jurisdiction, or by
9 taking other legal action to take possession of the residential
10 property that is the subject of the mortgage, if the debtor
11 does not cure the default by the date specified pursuant to
12 Paragraph (6) of this subsection;

13 (8) the right, if any, of the debtor to
14 transfer the real property that is the subject of the mortgage
15 to another person, subject to the security interest, which
16 transferee shall have the right to cure the default as provided
17 in the Mortgage Fair Foreclosure Act, subject to the mortgage
18 documents;

19 (9) the debtor's right to seek counsel from an
20 attorney of the debtor's own choosing concerning the debtor's
21 mortgage default, and that, if the debtor is unable to obtain
22 an attorney, the debtor may contact the New Mexico bar
23 association or lawyer referral services in the county in which
24 the real property securing the mortgage loan is located, and
25 that if the debtor is unable to afford an attorney, the debtor

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1 may contact the legal services programs in the county in which
2 the property is located;

3 (10) the name and address of the lender and
4 the telephone number of a representative of the lender whom the
5 debtor may contact if the debtor disagrees with the assertion
6 that a default has occurred or the accuracy of the calculation
7 of the action or amount required to cure the default;

8 (11) the name, address and telephone number of
9 a person with the authority to modify or otherwise affect the
10 debtor's obligation under the subject security interest; and

11 (12) the debtor's right to redeem a foreclosed
12 mortgage obligation.

13 D. The notice of intent to foreclose required to be
14 provided pursuant to this section shall not be required if the
15 debtor has voluntarily surrendered in writing the real property
16 that is the subject of the mortgage that is in default.

17 E. The duty of the lender pursuant to this section
18 to serve notice of intent to foreclose is independent of any
19 other duty to give notice pursuant to common law, principles of
20 equity, state or federal statute, rule of court or any other
21 right or remedy the lender may have as a result of the failure
22 of a lender to give such notice.

23 F. Compliance with this section shall be set forth
24 in the pleadings of any legal action referred to in this
25 section. If the plaintiff in any complaint seeking foreclosure

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1 of a mortgage alleges that the property subject to the mortgage
2 has been abandoned or voluntarily surrendered, the plaintiff
3 shall plead the specific facts upon which this allegation is
4 based.

5 Section 6. ACCOUNTING.--In conjunction with the notice
6 required pursuant to Subsection C of Section 5 of the Mortgage
7 Fair Foreclosure Act, the lender shall also provide the debtor
8 with an accounting of the loan obligation covering the
9 eighteen-month period prior to the date of the alleged default.
10 The lender shall certify that the information contained in the
11 accounting is true and accurate to the best of its knowledge.
12 The accounting shall include, at a minimum, a history of all
13 payments made during the eighteen-month period prior to the
14 date of the alleged default, and the lender's or servicer's
15 allocation of those payments to principal, interest and any
16 applicable fees.

17 Section 7. RIGHT TO CURE DEFAULT--PROCEDURE.--

18 A. Notwithstanding the provisions of any other law
19 to the contrary, as to any residential mortgage for which a
20 notice of intent to foreclose is required pursuant to Section 5
21 of the Mortgage Fair Foreclosure Act, whether or not such
22 required notice was in fact given, the debtor or anyone
23 authorized to act on the debtor's behalf shall have the right
24 at any time, up to the entry of final judgment by the court, to
25 cure the default or reinstate the mortgage by tendering the

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1 amount or performance specified in Subsection B of this
2 section. The payment or tender shall be made to the person
3 designated in the notice pursuant to Paragraph (6) of
4 Subsection C of Section 5 of the Mortgage Fair Foreclosure Act.

5 B. To cure a default pursuant to this section, a
6 debtor shall:

7 (1) pay or tender to the person identified
8 pursuant to Paragraph (6) of Subsection C of Section 5 of the
9 Mortgage Fair Foreclosure Act, in the form of cash, cashier's
10 check or certified check all sums due and owing;

11 (2) perform any other obligation that the
12 debtor would have been bound to perform in the absence of the
13 default or the exercise of an acceleration clause, if any; and

14 (3) pay all contractual late charges, as
15 provided for in the mortgage or other security instrument.

16 C. To cure a default pursuant to this section, a
17 debtor shall not be required to pay any charge, fee or penalty
18 attributable to the exercise of the right to cure a default as
19 provided for in the Mortgage Fair Foreclosure Act.

20 D. Cure of a default reinstates the debtor to the
21 same position as if the default had not occurred. It
22 nullifies, as of the date of cure, any acceleration of any
23 obligation under the mortgage or other security instrument
24 arising from the default.

25 E. If a default is cured after the filing of a

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1 foreclosure action, the lender shall give written notice of the
2 cure to the court. Upon such notice, the court shall dismiss
3 the action without prejudice.

4 F. The right to cure a default pursuant to this
5 section is independent of any right of redemption or any other
6 right or remedy pursuant to common law, principles of equity,
7 state or federal statute, or rule of court.

8 Section 8. MANDATORY SETTLEMENT CONFERENCE--MEDIATION--
9 PROCEDURE.--

10 A. In the initial pleading filed by a lender, the
11 lender shall certify that no loss mitigation efforts regarding
12 the mortgage at issue are pending, are in process or have been
13 initiated by either party within the thirty-day period prior to
14 filing the action.

15 B. At any time after the filing of any responsive
16 pleading, the court may on its own motion or at the request of
17 either party enter an order directing the parties to
18 participate in alternative dispute resolution as provided in
19 Subsection C of this section.

20 C. Prior to the entry of a final order of
21 foreclosure and where the debtor has not otherwise defaulted or
22 failed to appear, the debtor shall have the right to
23 participate in good faith, and the lender shall be obligated to
24 participate in good faith, in an alternative dispute resolution
25 process. Any alternative dispute resolution process shall be

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1 conducted at no direct or collateral cost to the debtor. All
2 parties shall be required to participate, and a designated
3 representative of each party with final decision-making
4 authority shall attend and participate.

5 D. The alternative dispute resolution process shall
6 include the participation of a counselor certified by the
7 federal department of housing and urban development, if
8 available, to assist the parties in identifying options to be
9 considered for settlement. The alternative dispute resolution
10 process may include:

11 (1) loss mitigation through a loss mitigation
12 agency certified by the federal department of housing and urban
13 development;

14 (2) a court-supervised settlement conference
15 to be held at the time and in the manner in which the court, in
16 the exercise of its discretion, deems appropriate;

17 (3) a settlement conference with a
18 court-appointed special master or mediator who will facilitate
19 workout discussions between the debtor and the lender;

20 (4) a court-annexed mediation process; or

21 (5) the debtor and lender may agree to
22 participate in private mediation with a mutually agreed-upon
23 independent, neutral mediator, provided that private mediation
24 shall be conducted at no direct or collateral cost to the
25 debtor.

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1 E. The alternative dispute resolution procedures
2 set forth in Subsection C of this section shall afford the
3 debtor and lender an opportunity to explore a variety of
4 alternatives to foreclosure that shall include:

5 (1) reinstatement of the loan and dismissal of
6 the foreclosure action upon the debtor's payment of applicable
7 fees and demonstration that the debtor can bring the loan
8 current;

9 (2) a repayment plan whereby the debtor agrees
10 to resume making monthly payments, plus a portion of the past
11 due payments each month, until the loan is brought current;

12 (3) a forbearance plan, which may include one
13 or more of the following features:

14 (a) suspension or reduction of payments
15 for a period sufficient to allow the debtor to recover from the
16 cause of default;

17 (b) a period during which the debtor is
18 only required to make the regular monthly mortgage payment
19 before beginning to repay the arrearage;

20 (c) a repayment period of at least six
21 months; or

22 (d) allowing reasonable foreclosure
23 costs and late fees accrued prior to the execution of the
24 forbearance agreement to be included as part of the repayment
25 schedule;

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1 (4) an extension agreement, whereby the debtor
2 pays a portion of the amount of the total arrearage, and the
3 remaining portion of the arrearage amount is added to the end
4 of the loan;

5 (5) a loan modification plan, which would
6 permanently change one or more terms of the defaulted loan
7 obligation, including:

8 (a) extending the amortization period of
9 the loan;

10 (b) converting an adjustable rate
11 mortgage into a fixed-rate mortgage;

12 (c) reducing the mortgage interest rate;
13 or

14 (d) adding missed payments to the
15 existing loan balance;

16 (6) a reasonable refinancing period of no
17 fewer than sixty days during which the lender agrees not to
18 pursue foreclosure and give the debtor an opportunity to seek
19 out refinancing of the loan obligation with a third-party
20 lender;

21 (7) a principal reduction agreement in those
22 cases in which the debtor's loan obligation has a negative
23 amortization;

24 (8) a principal forbearance agreement;

25 (9) a mortgage loan assumption agreement

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1 whereby a qualified third-party individual or entity can assume
2 the loan's payment obligation and the lender waives any
3 applicable "due on transfer" provision;

4 (10) an agreement by the debtor to execute a
5 deed in lieu of foreclosure in exchange for the lender
6 canceling the debt owed on the loan and terminating any
7 initiated foreclosure action;

8 (11) a short sale; or

9 (12) a voluntary surrender of the home in
10 exchange for cash consideration.

11 F. The debtor's right to participate, and the
12 residential mortgage lender's obligation to participate in good
13 faith, in an alternative dispute process pursuant to this
14 section shall arise only when the subject mortgage or other
15 security instrument is otherwise subject to a judicial
16 foreclosure process under the laws of New Mexico.

17 Section 9. VIOLATIONS--SANCTIONS.--If a court finds that
18 either party failed to negotiate in good faith or the lender
19 violated any provision of the Mortgage Fair Foreclosure Act in
20 bringing the action, the court may in its discretion dismiss
21 the action, award sanctions or assess attorney fees and costs.

22 Section 10. SHORTER REDEMPTION PERIOD.--

23 A. The parties to any residential mortgage security
24 instrument may agree to shorten a redemption period to not less
25 than thirty days provided that agreement is reached after the

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1 debtor receives the notice of intent to foreclose pursuant to
2 Section 5 of the Mortgage Fair Foreclosure Act and such
3 agreement is in writing. An agreement to shorten the
4 redemption period shall be supported by independent and
5 adequate consideration. An agreement to shorten a redemption
6 period shall disclose in plain language to the debtor that the
7 debtor is foregoing the presumptive nine-month period for
8 exercising the debtor's right of redemption, and that
9 disclosure shall be made in a manner reasonably calculated to
10 apprise the debtor of that fact. Agreements to shorten the
11 presumptive nine-month redemption period contained within the
12 terms of a mortgage are null and void and unenforceable.

13 B. This section shall not apply to agreements
14 between parties to any mortgage or other security instrument
15 that is not otherwise subject to a judicial foreclosure process
16 under the laws of New Mexico.

17 Section 11. DEFICIENCY JUDGMENTS PROHIBITED.--There shall
18 be no deficiency judgment entered in a foreclosure action
19 against a debtor who occupies the real property that is the
20 subject of the loan obligation or real estate security interest
21 as the debtor's primary residence, provided the debtor has
22 occupied the home as the debtor's primary residence for no
23 fewer than one hundred twenty days prior to the initiation of
24 the foreclosure action.

25 Section 12. REPEAL.--Section 39-5-19 NMSA 1978 (being
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1 Laws 1957, Chapter 109, Section 2, as amended) is repealed.

2 Section 13. SEVERABILITY.--If any part or application of
3 this act is held invalid, the remainder or its application to
4 other situations or persons shall not be affected.

5 Section 14. APPLICABILITY.--The provisions of this act
6 shall apply to foreclosure proceedings instituted on or after
7 July 1, 2009.

8 Section 15. EFFECTIVE DATE.--The effective date of the
9 provisions of this act is July 1, 2009.